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No. 06-670

IN THE

Supreme Court of the United States

JANICE F. WILLIS, PETITIONER

v.

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE AND UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE PERSONNEL APPEALS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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1. The parties have two entirely different views of this case. In Petitioner's view, the Court is asked to decide whether an attorney having been granted the right to intervene in an attorney's fees proceeding under 5 U.S.C. § 7701 subsequently can be denied the right to appeal from an adverse decision thereunder. In Respondents' view, the United States Court of Appeals for the Federal Circuit lacks unspecified "standing" to consider such an appeal. Petitioner's view is well-grounded in law: Respondent's view is not.

It is, of course, axiomatic that once permitted to intervene in a federal court proceeding, an intervenor has the same rights to appeal from a final judgment as do all other parties to the litigation regardless of the limitations imposed at the time of intervention. *Stringfellow, et al. v. Concerned Neighbors in Action et al.*, 480 U.S. 370, 375-376. Similarly here, an intervenor before the PAB enjoys all the rights of appeal as do the other parties before it since 31 U.S.C. § 755(a) provides only that "[a] final decision under [the enumerated] section[s] of this title may be reviewed by the United States Court of Appeals for the Federal Circuit." Thus, while Respondents correctly assert (Br. in Opp. 7-8) that the enabling legislation "confers no freestanding entitlement to *attorneys* to seek to [sic] an award of fees on their own behalf," once the Administrative Judge granted Petitioner leave to intervene in the administrative fee petition litigation, denied her request for fees, and the PAB both considered her appeal and affirmed the finding of its Administrative Judge, the United States Court of Appeals for the Federal Circuit had jurisdiction to review Petitioner's appeal from that final agency action adversely affecting

her interests.

2. Respondents' contention (Br. in Opp. 6) that "a person has no standing to appeal the rejection of a claim that has never been filed" is just plain wrong. As noted, above, Congress granted the Federal Circuit broad jurisdiction to review "a final decision" of the PAB without regard to an appellant's status before that board. Not surprisingly, Respondents offer no support for their contrary contention, for there quite simply is none.[1] The petition should be granted.[2]

3. Respondents' reliance (Br. in Opp. 8) on holdings wherein the dictum of this Court is to the effect that only a prevailing 'party' is entitled to pursue a fee request under federal fee shifting statutes is to no avail. As in all cases interpreting the statutory provisions for an award of attorneys' fees, the Court's "[analysis] must begin with the language of the statute itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). The plain language of the statute here is that

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[1]Respondents' repeated attempts (Br. in Opp. 6, 10) to limit Petitioner's right to appeal because she intervened in the PAB proceeding, rather than filed "a claim" pursuant to 4 C.F.R. §§ 28.86 - 28.90, highlights a distinction without a difference for once the Administrative Judge granted Petitioner leave to intervene to protect her right to payment for services rendered, and the PAB heard her appeal, any argument over the form of her "claim" became moot.

[2]Respondents also are correct in their observation (Br. in Opp. 5) that Petitioner is not asserting third party standing in this case since she has standing to appeal in her own right as an intervenor in the proceedings before the PAB.

> [T]he Board, or an administrative law judge or other employee of the Board designated to hear a case, *may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment* if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice.

5 U.S.C. §7701(g)(1) (emphasis supplied). This statute is silent on the question of *who* is entitled to payment of the attorneys' fees "incurred . . . [by the] prevailing party" thus permitting their award simply if "warranted in the interest of justice." Justice demands that Petitioner - who represented the complaining party through the successful adjudication of her administrative claim of a prohibited personnel practice committed by government employees - be compensated in accord with the statute pursuant to which she represented her client.

In contrast to the fee provision in this case, the fee provisions upon which Respondents' rely (Br. in Opp. 8) are fundamentally different in their wording *to wit*: "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."[3] The

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[3]42 U.S.C. §1988(b), cited in *Evans v. Jeff D.*, 475 U.S. 717 (1986); 42 U. S. C. §3613©)(2) ([T]he court, in its discretion, may allow the prevailing party a reasonable attorney's fee and costs"), 42 U. S. C. §12205 ([T]he court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs), cited in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n 4 (2001).

statute under review here provides, on the other hand, that "the Board . . . may require payment by the agency involved of reasonable attorney fees." That difference, in conjunction with Petitioner's status as an intervenor in the PAB proceeding, puts this case in a patently different posture from those upon which Respondents rely. And, that difference dictates that the petition be granted.

4. Assuming that all federal fee shifting provisions are equal and, as Respondents contend (Br. in Opp. 8), case law interpreting the fee provision of Title VI, 42 U.S.C. §1988, is applicable to this case, its application creates a clear and unmistakable conflict with the Seventh Circuit's holding in *Mathur v. Bd. of Trustees of Southern Illinois Univ.*, 317 F. 3d 738 (7th Cir. 2003), as we show in the petition. As here, the client in *Mathur* declined to appeal from the award of attorneys' fees made. Unlike here, however, the Seventh Circuit concluded that "the appellants [two of Mathur's attorneys, claim[ing] that the district court improperly reduced the proffered hourly rate] have properly demonstrated that they are actual parties in interest, and we have jurisdiction to hear their appeal." *Mathur v. Bd. of Trustees of Southern Illinois Univ.*, 317 F. 3d at 742. The Court should resolve that conflict so as to give teeth to Congress's vision of a fundamentally fair judicial system in which attorneys like Petitioner, the real parties in interest, are paid for their services by losing defendants when they shoulder the burden of representing plaintiffs under federal fee shifting statutes who otherwise would not be able to obtain legal representation.

CONCLUSION

For the reasons stated above, and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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